No. 93-205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CONSTRUCTION INTERIOR SYSTEMS, INC.,
Petitioner,

vs.

MARRIOTT FAMILY RESTAURANTS, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether pursuant to Rule 10 of this Court and other principles governing the exercise of this Court's discretionary jurisdiction, issuance of a writ of certiorari is appropriate in a case presenting only questions of the substantive contract law of a particular state, which questions are admittedly governed by the pronouncements of the highest court of that state.

2. Whether this Court should exercise its discretionary jurisdiction to review a decision by the United States Court of Appeals solely to assure that the decision of that court accords with substantive principles of the common law that have been pronounced by the highest court of a particular state.

3. Whether there exists a principle of substantive law or federal procedure requiring a federal judge to find contract language to be ambiguous if another federal judge has so found.

4. Whether this Court should exercise its discretionary jurisdiction to decide whether certain testimony might have qualified as expert testimony had the petitioner proffered the testimony as such, where the petitioner never sought to qualify the witness as an expert in the District Court and never raised the issue of expert testimony on appeal until its Application for Reconsideration of the Court of Appeals' decision.

PARTIES

PETITIONER

(Plaintiff-Appellee in the United States Court of Appeals for the Sixth Circuit):

Construction Interior Systems, Inc.

RESPONDENT

(Defendant-Appellant in the United States Court of Appeals for the Sixth Circuit):

Marriott Family Restaurants, Inc.

Respondent, Marriott Family Restaurants, Inc., is a wholly-owned subsidiary of Marriott Corporation.

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BRIEF IN OPPOSITION

I. INTRODUCTION

Petitioner Construction Interior Systems, Inc. ("CIS") seeks further review of a decision by the United States Court of Appeals for the Sixth Circuit which entered judgment in favor of Respondent Marriott Family Restaurants, Inc. ("Marriott"). The dispute involves an alleged breach of a written settlement agreement. As CIS' petition points out, federal jurisdiction was based on diversity. No issue of federal law was raised in the District Court, nor in the Court of Appeals. In fact, the Court of Appeals decision rests solely upon its construction of the set-

tlement agreement. In objecting to the Court of Appeals' decision, CIS urges this Court to review the proper application of Ohio contract law and to construe a particular contract differently from the construction adopted by the Court of Appeals. CIS' arguments do not support a grant of certiorari.

Moreover, CIS bases its petition upon (1) a theory which CIS did not even argue to the District Court nor present to the Court of Appeals until its Application for Reconsideration: that supposed expert testimony established an industry-wide meaning of a contract term different from the ordinary meaning; and (2) the patently absurd contention that proper judicial practice requires an appellate judge to find contract language ambiguous if any other federal judge has so found.

In addition, petitioners' filing contains numerous distortions and omissions, the correction of which amply shows the solid foundation for the decision of the United States Court of Appeals for the Sixth Circuit—expressed in a ten (10) page closely-reasoned opinion at 984 F.2d 749 [pages 1a-22a of Appendix to CIS' Petition].

II. STATEMENT OF THE CASE

This case has its origins in a dispute that arose ten years ago between Marriott—then known as Howard Johnson Company—and CIS. That dispute related to approximately $775,000 worth of work (not profit) involving refurbishment of motor lodge rooms which Marriott/Howard Johnson had bid out to CIS. This work subsequently was taken away from CIS. In early 1984, Marriott/Howard Johnson and CIS entered into a compromise agreement settling their dispute. The

key language relevant to the issues raised in the District Court and the Court of Appeals is contained in a January 24, 1984 letter.

> We [Howard Johnson, now Marriott] agree immediately to put you on the bidders list for construction and rehab work. If after one year from this date you have not been the successful bidder on $300,000 worth of work, we agree to negotiate with you in good faith, subject to prevailing rates and quotes, for the performance by you of work which, together with the amount of work you may have been awarded during the prior year, would equal the sum of $300,000.
>
> [Letter reproduced at pages 61a-62a of Appendix to CIS' Petition.]

Subsequently—in November 1985—the stock of Howard Johnson Company was purchased by Marriott Corporation and Howard Johnson's name was changed to Marriott Family Restaurants, Inc. Contemporaneously, the motor lodges owned by Howard Johnson Company were sold to a new and unrelated entity known as Howard Johnson Company, Inc. ("HJC"), a wholly-owned subsidiary of Prime Motor Inns, Inc. After the corporate acquisition and reassignment of the motor lodges to HJC, *CIS was on the bidders list obtained by HJC from Marriott and was the successful bidder on projects exceeding $485,000 worth of refurbishment work*—a fact not mentioned in CIS' certiorari petition, but stipulated to by the parties in the District Court and essential to the Court of Appeals' decision.

The Court of Appeals held that (1) the terms of the 1984 settlement agreement were unambiguous and only obligated Marriott to exercise good faith in awarding CIS $300,000 worth of work; and (2) therefore, the stipulation of the parties that HJC had awarded CIS $485,000 worth of work in satisfaction of Marriott's obligation meant that CIS had received everything to which it was entitled under the settlement agreement: "[W]e conclude that [Marriott's] obligations under the Settlement Agreement were satisfied as a matter of law in 1986 by CIS' receipt of over $485,000 worth of refurbishment work, and that defendant's [Marriott's] motion for j.n.o.v. should have been granted." 984 F.2d at 753, page 7a of Appendix to CIS' Petition.

In its certiorari petition, CIS renews its argument that the phrase "put you on the bidders list" contained in the settlement agreement meant that CIS had a right to receive bid invitations on *all* of Marriott's motel lodge refurbishment work *ad infinitum*, along with an expectation of being awarded a certain percentage of the work on which it bid.[1] In essence,

---

[1] CIS' view of its rights under the Settlement Agreement was not always so expansive. CIS initiated this case by filing a complaint in May 1987, seeking therein to *avoid the 1984 settlement agreement entirely* and pursue alleged lost profits based upon the $775,000 worth of work (contract price, not profit) which was the subject of the dispute underlying the settlement agreement. Obviously, petitioner at first believed that recovery of whatever profit it would have earned on $775,000 worth of work in 1983 would exceed its recovery under the settlement agreement. The District Court, however, barred Petitioner's attempt to avoid the settlement agreement by Decision dated September 27, 1989, holding that any claims of CIS were limited solely to those based on the terms of the settlement agreement. When

CIS wants this Court to take jurisdiction over a case *solely involving issues of Ohio contract law* because CIS is dissatisfied with the interpretation adopted by the majority of the Sixth Circuit Court of Appeals.

To bolster its position, CIS adds an argument which it raised for the first time in its Application for Reconsideration of the Court of Appeals' decision: CIS now contends that certain self-serving statements made by CIS president John Penker during cross examination constituted expert testimony as to an industry-wide meaning of the words "put you on the bidders list." The Court of Appeals properly declined reconsideration based upon this belated argument. Indeed, the Court of Appeals addressed the matter with these words in its opinion:

> CIS was put on the bidders list. While CIS disputes that it was given all the rights which it contends should have flowed from being put on the list, these alleged rights are not spelled out in the agreement. Nor was there any expert testimony to the effect that the refurbishment construction industry has a particular meaning for the phrase "put on the bidders list." On the contrary, *the testimony offered and admitted on this point concerned CIS' expectations and intentions. Under Ohio law, however, intentions not ex-*

---

it learned it could not avoid the settlement agreement, CIS' view of its meaning apparently underwent a dramatic change. Now petitioner argued that the settlement agreement entitled it to *profits* exceeding $1,000,000. Therefore, the damages sought by CIS at trial for the alleged breach of the settlement agreement exceeded the total amount of work which originally gave rise to the settlement agreement.

> *pressed in an unambiguous agreement are presumed to have no existence, and may not be shown by parol evidence.* [cite omitted]
>
> [784 F.2d at 756 (emphasis added), pages 13a-14a of Appendix to CIS' Petition.]

CIS itself cites most of this passage at p. 9 of its petition—but significantly omits the Sixth Circuit's observation that CIS offered testimony in the District Court as parol evidence showing expectations and intentions as to the particular contract, not as expert testimony showing an industry-wide use of language. The Sixth Circuit justifiably reached this conclusion because CIS never attempted to qualify any witness as an expert and didn't assert its argument regarding alleged expert testimony until the Application for Reconsideration of the Court of Appeals decision.

Moreover, it is not surprising that the Court of Appeals decision does not address the specific excerpt of testimony by John Penker now said to constitute "expert testimony"—because CIS itself *did not even designate those pages of the transcript as part of the joint appendix* submitted to the Court of Appeals. Indeed, the footnote at p. 10 of the certiorari petition—arguing after the fact that John Penker (president of CIS) could have qualified as an expert—is a verbatim reprint of footnote 5 on p. 6 of CIS' Application for Reconsideration to the Court of Appeals, with one omission: CIS omits its statement acknowledging that it did not designate the pages in question to be considered by the Court of Appeals. [App. 2a.] Under these circumstances, CIS' contentions regarding supposed "expert testimony" simply do not present an issue of possible error which this Court should review.

The misleading nature of CIS' selective citation to the trial transcript should also be noted here. CIS renews its contention that it was permitted to bid on all Marriott projects prior to the 1983 dispute [page 3 of Petition], but ignores trial testimony indicating that all contractors on the bidder's list were *not* solicited for bids on every project. (Trial Testimony of John Stearns, TR 506; Deposition Testimony of Robert Wickham, read at trial, Deposition at pp. 26-28, 54-55, after TR 931) Bids were evaluated based upon a number of factors and projects were not necessarily awarded to the lowest bidder. (Deposition Testimony of Robert Wickham, read at trial, Deposition at pp. 56-57, after TR 931; Trial Testimony of John Stearns, TR 503)

At page 11 of the Petition, CIS also cites out of context certain testimony of John Stearns, a former Marriott Vice President. The quote CIS refers to comes from the deposition of Mr. Stearns, cited in an attempt by CIS' counsel to impeach Stearns' clear testimony—which CIS conveniently omits by failing to reproduce page 563 of the trial transcript:

> Q. [Mr. Atkins, CIS' counsel]: Now, sir, that was to begin then effective immediately; they were to have or to receive invitations to bids on all jobs that were going to be done, or bids rather, effective January of 1984; isn't that true?
>
> A. [Mr. Stearns]: *No, it is not.*
>
> [Tr. 563; App. 5a; (emphasis added).]

The deposition testimony by which CIS hoped to impeach shows Stearns responding to a different question entirely: whether or not work would have been

available in 1984 for CIS to bid on. In any event, Stearns' clear testimony at trial was that the settlement did not confer a right upon CIS to bid on all refurbishment projects.

Finally, CIS' contentions at page 16 of the petition—that Mr. Stearns supposedly testified that CIS would be invited to bid on 2,500 rooms in 1984—are mystifying: the passages cited and attached to the petition simply do not show Mr. Stearns saying any such thing. Whatever other conclusions this Court may draw, CIS has not shown that the Sixth Circuit Court of Appeals' decision was in any way unreasonable or clearly erroneous.

III. SUMMARY OF ARGUMENT

This Court should deny certiorari in this case because (1) the case presents only issues of state contract law and does not present any federal question whatsoever; (2) full review by this Court is not necessary to reject Petitioner's contention that a finding of ambiguity by one federal judge is binding on another federal judge; and (3) Petitioner's contentions regarding purported expert testimony do not merit review by this Court since Petitioner never attempted to qualify John Penker as an expert witness, nor did Petitioner ever argue that Mr. Penker's testimony established an industry-wide meaning of contract terms until Petitioner's Application for Reconsideration of the Court of Appeals decision.

IV. LEGAL ARGUMENT

A. This Case Does Not Present A Proper One For The Exercise Of This Court's Discretionary Jurisdiction Because There Is No Split Of Authority Among The Circuits; The Case Involves Only Issues Of Substantive Contract Law Of Ohio; And There Is No Federal Question Whatsoever In This Diversity Case.

1. Petitioners in this case point to no split of authority among federal circuit courts relating to the questions they present for review.

This Court has seen fit to set forth at Rule 10 the "considerations governing review on writ of certiorari." The "character of reasons that will be considered" in connection with a petition for certiorari includes the situation where a court of appeals "has rendered a decision in conflict with the decision of another United States court of appeals on the same matter . . ." CIS does not and cannot point to a split of authority among the circuits as to the questions it presents for review. Moreover, even if CIS could point to such split, a split of authority does not furnish grounds for certiorari where such split is based upon differences in state common law—which the lower courts are obliged to apply in diversity cases pursuant to *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938):

> As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts.
>
> [*Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938).]

2. Certiorari should be denied because CIS' petition presents no important question of federal law—nor indeed any question of federal law whatsoever.

Petitioner has asked this court to review a determination by the Sixth Circuit Court of Appeals that the language of a written settlement agreement governed by principles of Ohio contract law was unambiguous. It is well-settled that construing contract language is ordinarily a matter well within the substantive state common law which—pursuant to *Erie*, *supra*—the federal courts are obliged to apply in diversity cases. See e.g. *Ruhlin*, *supra* (construction of insurance contract a matter of substantive state law).

Ruhlin does mention a former provision of the rules of this Court indicating that certiorari might be appropriate where a court of appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions." *Ruhlin*, 304 U.S. at 206. This phrase does not appear in the current Rule 10 of this Court. Indeed, this phrase was deleted beginning with the 1980 version of Rule 10. See discussion in 13 *Moore's Federal Practice* ¶ 810.01[3] n. 5 (2d Ed. 1985).

By deleting such provision this Court has indicated that alleged misapplication of state law by the federal circuit courts is ordinarily no basis for the exercise of discretionary jurisdiction. Since the present case presents no issue of federal law whatsoever, certiorari should be denied.

3. Petitioner's bare assertion that the Sixth Circuit Court of Appeals "has so far departed from the accepted and usual course of judicial proceeding" provides no basis for certiorari in this case.

Apparently acknowledging that their petition presents no issue of federal law for this Court to review, petitioners rely on the provision of Rule 10 concerning the Court's supervisory power to correct departures from the usual course of judicial proceedings. In its discussion of this provision, *Moore's Federal Practice* enumerates the kinds of situation that fall within the provision:

> For example, the Court has granted certiorari to clarify the application of the jurisdictional amount in controversy requirement in class actions; to define the scope of the evidentiary protection to be given the attorney work-product in the discovery process; to determine in a diversity case whether a Civil Rule for service of process was overridden by state law; and in related situations. [Marginal notes omitted.] . . . The Court has granted certiorari to review the decision in a case which, if left standing, would alter the administration of criminal justice in the federal courts. . . . More recently, the Court quoted its supervisory powers in granting certiorari to review a judgment of the Second Circuit [in which the district and appellate courts had decided constitutional questions before reaching the statutory issue].
>
> 13 *Moore's Federal Practice* ¶ 810.27 (2d Ed. 1985).]

It is clear that this Court ordinarily considers the provision cited by petitioner to furnish grounds for certiorari where important federal jurisdictional and procedural matters are implicated—not in cases involving solely issues of substantive state law.

B. In Construing Contract Language—And Specifically In Deciding Whether Or Not Such Language is Ambiguous—No Federal Judge Is Bound To Adopt The Opinion Of Another Federal Judge On The Same Question.

Two of CIS' three "questions presented for review" concern the fact that in this case there was a disagreement among different federal judges as to whether or not contract language was ambigous. The District Court judge apparently—although the record is not absolutely clear on this point—determined that the following sentence was ambiguous and should be interpreted by the jury: "We [Howard Johnson] agree immediately to put you on the bidders list for construction and rehab work." In the Court of Appeals, the majority of the 3-judge panel found the sentence to be unambiguous when read in context and reversed the judgment, while a dissenting judge would have agreed with CIS' position that the language was ambiguous. CIS would have this Court base its review on that disagreement:

> During the course of this case, four federal judges have considered the pertinent language of the settlement agreement. The judges are equally divided on whether or not the phrase "put you on the bidders list" has a meaning that can be discerned from the four corners of the document or whether the phrase is susceptible to more than one reasonable interpretation. When four thoughtful,

> reasonable and experience jurists are thus polarized, such disagreement itself manifests that the pertinent language is ambiguous. For the panel majority to hold otherwise constitutes a radical departure not only from accepted judicial procedure, but also from the fundamental meaning of the word "ambiguous."

Petition for Certiorari at pp. 13-14. Although CIS argues no further, it is clear that the only way this Court could give petitioner the relief it asks for is to adopt a principle that where one or more federal judges opine that contract language is ambiguous, such language is ambiguous as a matter of law—the contrary opinion of any other federal judge notwithstanding.

Obviously such a principle would completely undermine the fundamental principles of the appellate process. Under such a doctrine, once a district judge found contract language to be ambiguous, there would in effect be no room for an appeal of that question. Moreover, such a principle would overturn the rule that the majority opinion on a three judge panel decides the case: once one of the three judges decided that contract language was ambiguous, the other judges would simply have to bury their genuine opinions as a matter of law. Clearly there is no place for the principle CIS advocates in the federal appellate process.

C. Petitioner's Contention That Supposed "Expert Testimony" Supported Its Interpretation Of Contract Terms Furnishes No Basis For Review By This Court Because Petitioner Failed to Proffer Expert Testimony at Trial and Because The Record Shows No Exercise of Lower Court Discretion Which This Court Needs To Correct.

One bedrock principle of civil litigation in our adversarial system is that each party must timely make all of the arguments on behalf of its position. It may not hold certain argument in reserve and raise them for the first time on appeal. By the same token, no party may fail to proffer testimony as expert testimony and subsequently fault courts for not having reviewed the testimony as such.

In this case, CIS never asserted at trial that John Penker's testimony had any relevancy or significance except as the testimony of a lay witness regarding the facts at issue in this case. Indeed, CIS' assertion at p. 10 of its certiorari petition that Marriott "argued that in drafting the settlement agreement, it had intended 'put you on the bidders list' to have a meaning different than its meaning particular to the construction of rehab industry" is an egregious misrepresentation of the record in this case. Marriott never made any such argument but instead relied upon the common sense, ordinary meaning of these terms. Marriott was never called upon to make such argument because CIS never tried to qualify John Penker as an expert and never established any industry-wide meaning of contract terms. Accordingly, the Court of Appeals correctly held that "there [was not] any expert testimony to the effect that the refurbishment construction industry has a particular meaning for the phrase 'put on the bidder's list.'"

984 F.2d at 756, page 13a of Appendix to CIS' Petition.

Petitioner is unable to change the record by its distortions and misrepresentations: CIS not only waived the issue of "expert testimony" by failing to timely raise it, but petitioner's failure to proffer John Penker's testimony as expert testimony in the trial court means that there is no decision of the trial court for the Court of Appeals or this Court to review. It is well settled that "the district court has wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony." *Hamling v. United States*, 418 U.S. 87, 108 (1974). This Court has further opined that certiorari is ordinarily not appropriate to review questions of expert testimony unless there is a decision of a trial court showing an abuse of the trial court's discretion:

> Respondent additionally argues that certain statements by the prosecution and the District Court's exclusion of purported expert testimony justify reversal of the verdict, and that the Court of Appeals decision should be affirmed on those grounds. The Court of Appeals rejected respondent's challenge to the exclusion of the testimony of the proffered expert, 501 F.2d, at 150-151. Respondent did not present this issue or the question involving the challenged prosecutorial statements to this Court in a cross-petition for certiorari. Without questioning our jurisdiction to consider these alternative grounds for affirmance of the decision below [cites omitted], we do not consider these con-

> tentions worthy of consideration. Each involves an *issue that is committed to the trial court's discretion. In the absence of a strong suggestion of an abuse of that discretion or an indication that the issues are of sufficient general importance to justify the grant of certiorari we decline to entertain them.*
>
> [*United States v. Nobles*, 422 U.S. 225, 241 n.16 (1975) (emphasis added).]

Here, CIS is unable to point to any suggestion of an abuse of discretion for the simple reason that there was no exercise of any discretion whatsoever—CIS never invoked the trial court's discretion to admit or exclude testimony of John Penker based upon his purported qualifications as an expert.

Moreover, the statements referred to by CIS are self-serving and constitute mere defensive posturing in response to vigorous cross examination. CIS indicates at footnote 2 on p. 10 of its petition that Marriott should have objected or moved to strike the statements. This contention is absurd: Because no qualification of such statements as expert testimony was attempted by CIS, Marriott had no reason to lodge objections.

Accordingly, the supposed "expert testimony" of John Penker furnishes no grounds for review by this Court since there is no decision below relating to the admission or exclusion of such testimony based upon Penker's qualifications.

V. CONCLUSION.

For all the foregoing reasons, Respondent Marriott Family Restaurants, Inc. respectfully requests this

Court to deny certiorari and allow the well-considered decision of the United States Court of Appeals for the Sixth Circuit to stand.

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 91-3330/3373

CONSTRUCTION INTERIOR SYSTEMS, INC.,
Plaintiff-Appellee,

v.

MARRIOTT FAMILY RESTAURANTS, INC.,
Defendant-Appellant.

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PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

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> particular meaning for the phrase "put on the bidders' list."

Opinion at 13. (emphasis in original)

It is unclear how the majority could have concluded there was no such testimony explaining the express language "put you on the bidders' list" in context particular to the industry involved. John Penker, the president of CIS, testified on cross examination:

> Q. And, Mr. Penker, on defendant's exhibit X [plaintiff's exhibit 14, J.A. at 417] there is no explicit language that says that Construction Interior Systems is entitled to bid any particular number of jobs; is there sir?
>
> A. In terms of standard construction practice, when you are placed on a bidders' list, you are issued invitations for all bids issued by that person who creates the list. That is the standard construction practice.
>
> Q. There is no such language in defendant's exhibit X; is there sir?
>
> A. Yes, there is, the first sentence: "We agree immediately to put you on the bidders' list for construction and rehab work." Under standard construction practice, that means you have the opportunity to bid the work that is available from the company. That is the purpose of the list.

T.R. Vol. 2, at 274-275.[5]

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[5] These pages of the record were not designated by either party as part of the Joint Appendix; as a result, it may be that this undisputed expert testimony escaped the attention of the panel. This evidence was received without objection or motion to strike by the defendant. Nor did the defendant challenge the expert qualifications of the witness to

The defendant, however, argued that in drafting the settlement agreement, it had intended "put you on the bidders' list" to have

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testify regarding the meaning of the phrase "put on the bidders' list" particular to the construction and rehab industry. It cannot reasonably be doubted that Mr. Penker is an expert in this particular industry. Mr. Penker's experience in the motor lodge renovation and refurbishing industry spans more than a decade; first, beginning early in the 1970's as vice-president of construction for Winegardner & Hammons (which has over 42 Holiday Inns across the United States) and then, continuing in 1979 as president of CIS which did renovation and refurbishing work for Ramada Inn, Holiday Inns, Best Western, Budgetel, Imperial 400, Marriott, as well as for Howard Johnson, all in the period immediately before the settlement agreement of January 24, 1984. T.R. at 41-46.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION
COURT OF APPEALS NOS. 91-3330 and 913373
CIVIL ACTION NO. C-1-87-0337

CONSTRUCTION INTERIOR SYSTEMS

Plaintiff,

-vs-

MARRIOTT CORPORATION,

Defendant.

Cincinnati, Ohio
Thursday, November 8, 1990
Fourth Day of Jury Trial

Volume IV (Pgs. 489-607

COMPLETE TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE S. ARTHUR SPIEGEL and JURY TRANSCRIPT ORDERED BY: Messrs. Klatt and Temin

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Law Clerk:	Adam P. Hall, Esq.
Courtroom Clerk:	Paul J. Schulz, III Elizabeth Schaeffer
Court Reporter:	Mary Ann Ranz

* * *

[563] correct?

A. That is also correct.

Q. And it's also true, as a matter of fact, that you did an independent analysis yourself and you went to look at the job site and concluded that the work that CIS Construction Company was doing prior to its being removed from the bid list wasn't any better or any worse than any other contractors were doing for you at the same period of time; isn't that true?

A. I think that is a fair statement, except I didn't follow scope on this particular job.

Q. Fair statement, is it not it? True?

A. That's what I just said.

Q. Yes. Then, sir, you went on to talk about what the agreement really was, what the body of the agreement was going to say in the third paragraph; didn't you?

A. I did.

Q. Okay. And the very first thing was, that you agreed to put them on the bid list for construction and rehab work; isn't that true, sir?

A. That's true.

Q. Now, sir, that was to begin then effective immediately; they were to have or to receive invitations to bids on all jobs that were going to be done, or bids rather, effective January of 1984; isn't that true?

A. No, it is not.

* * *